



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: E.D.P. Enterprises, Inc.

File: B-282232

Date: June 17, 1999

Keith L. Baker, Eckert Seamans Cherin & Mellott, for the protester.
John Richardson, Esq., and David H. Brunjes, Esq., Department of the Treasury, for the agency.
Christina Sklarew, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation bonding requirements are unobjectionable where the agency reasonably required bonds in an amount designed to ensure continuous provision of on-site food services for students in federal training programs, and where contractor will have the use of government-furnished facility and equipment in order to provide the required food services.

DECISION

E.D.P. Enterprises, Inc., a small business, protests the bonding requirements in request for proposals (RFP) No. FTC 99-3, issued by the Department of the Treasury, Federal Law Enforcement Training Center, for the provision of food services at its training center in Glynco, Georgia. EDP asserts that the bonding requirements are unreasonable and unduly restrict competition.

We deny the protest.

The RFP, issued on January 27, 1999 and amended three times, calls for offers to provide three meals per day in support of center training programs in a cafeteria-style dining facility on the center grounds. The center offers a variety of training programs that range from a single week to 18 weeks in duration, and typically employs approximately 2,000 staff and contract support personnel to provide training for 2,000 students. The students receive all their meals in the dining facility, and many staff members eat some of their meals in the facility. The agency states that although there are restaurants in the surrounding area, none of them are able to provide meals for the student population within the time available during training sessions. Contracting Officer's Statement at 2.

The RFP contemplated the award of a contract for a 1-year base period, with four 1-year option periods. The RFP, in Sections L.17 and L.18, required offerors to submit a bid bond equal to 20 percent of the bid amount for the base period, not to exceed \$3,000,000, and to furnish within 10 days after receipt of award a performance bond equal to 20 percent of the amount awarded for each contract year.

EDP protests that the performance bond requirement is unreasonable and should either be eliminated or reduced to approximate the current, depreciated value of the government-furnished property under the contemplated contract.¹ Protest at 7. The protester argues that the bonding requirements unduly restrict competition because the substantial additional expense of obtaining the bonds makes it difficult for small businesses to compete. The agency explains that its decision to include a performance bond requirement was “based upon an overriding Government interest in the performance of an uninterrupted contract,” and that this, in turn, is based on both the need to ensure uninterrupted performance and the need to protect government property entrusted to the contractor for the performance of the required services. Agency Report, Memorandum of Law, at 3.

Under FAR § 28.103-2, the contracting officer has the discretion to determine whether bonds are needed to protect the government’s interest in a particular procurement. Space Servs. Int’l Corp., B-215402.2, Oct. 22, 1984, 84-2 CPD ¶ 430 at 1. This regulation lists four examples of situations that may warrant a performance bond, one of which is where government property or funds are to be provided to the contractor for use in performing the contract. FAR § 28.103-2(a)(1). In addition, as the agency correctly points out, the contracting officer is permitted to require a performance bond to protect the government’s interest whether or not the rationale for imposing the requirement falls within the four examples listed in the FAR. See Cobra Techs., Inc., B-238031 et al., Feb. 27, 1990, 90-1 CPD ¶ 242 at 3. Although a bond requirement may result in a restriction of competition by excluding some small businesses, it nevertheless can be a necessary and proper means of securing to the government the fulfillment of the contractor's obligation under the contract in appropriate situations.

¹ Although EDP initially protested against both the bid bond and the performance bond requirements, it provided no specific support for its objections to the bid bond requirement, nor did it mention this basis of protest in its comments on the agency report. Since Federal Acquisition Regulation (FAR) § 28.101-1(a) provides that, except under circumstances not present here, bid guarantees shall be required whenever a performance bond is required, we need not address this basis of protest separately as the propriety of the bid bond requirement depends on the validity of the performance bond requirement.

Id.; Govern Serv., Inc., B-233365, Jan. 27, 1989, 89-1 CPD ¶ 92 at 2. This is so even where a small business set-aside solicitation is involved. Aspen Cleaning Corp., B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289 at 2-3.

While generally contracting agencies should not require performance bonds for other than construction contracts, the FAR recognizes that there are situations in which bonds may be necessary for nonconstruction contracts in order to protect the government's interests. FAR §§ 28.103-1, 28.103-2. In reviewing a challenge to the imposition of a bonding requirement, we consider whether the requirement was reasonable and was imposed in good faith. IBI Sec., Inc., B-235857, Sept. 27, 1989, 89-2 CPD ¶ 277 at 3. Here, the record provides a reasonable basis for the agency's imposition of the bonding requirements.

The agency explains that the performance bonds were required to ensure the continuous provision of food services during training courses, and that the government property that will be entrusted to the care of the contractor for use in performing the contract also independently justifies the bonding requirement. The training center typically has a population of 2,000 students, who receive all their meals in the dining facility and who will rely on the food services being procured under this RFP. While EDP suggests that this situation is unlike the situation in D.E.W. Management Servs., Inc., B-246955, Apr. 10, 1992, 92-1 CPD ¶ 358, in which we found reasonable a requirement for a performance bond because of the agency's need for uninterrupted performance of a mess attendant service contract in a remote Alaskan location, Protester's Comments at 3, the protester does not dispute the agency's statement that the restaurants in the area surrounding the training center are not sufficiently equipped to provide meals for all the students within the time constraints inherent in its training schedule. In these circumstances, the agency reasonably determined that a suspension of contract performance would seriously impede the training center in the accomplishment of its mission. Further, we have recognized that an agency's requirement for continuous operations in its food service facilities may provide a reasonable basis for a bonding requirement, even in locations that are not remote. See, e.g., Renaissance Exch., Inc., B-216049, Nov. 14, 1984, 84-2 CPD ¶ 534. In short, we see no basis to question the reasonableness of the agency's determination to require bonding here.

EDP also objects that the magnitude of the bond requirement is excessive, alleging that the value of the government property to be furnished is too low to justify a bond in the amount required here. The protester asserts that the equipment to be furnished consists primarily of used kitchen equipment with a relatively low value, particularly since much of the equipment is fully depreciated, as listed on the agency-furnished inventory list. EDP contends that while the equipment is valued at approximately \$308,000 on the agency's list, its actual current value is closer to \$63,000. Protest at 5-6. In contrast, EDP argues that a performance bond equal to 20 percent of the base-year bid price will amount to approximately \$1.2 million, which it argues is excessive and unreasonable. Protester's Comments at 2-3.

We find these arguments unpersuasive. With respect to the value of the equipment to be furnished by the government, we do not think the “depreciation dates” included in the inventory list provided in the RFP are probative as to the value of the equipment. RFP § J, Technical Exh. 9. Presumably, the equipment to be furnished is currently functional, whether the theoretical depreciation date is passed or not, and would need to be replaced if damaged during the course of contract performance. In these circumstances, the government has a protectable interest in the equipment at its replacement value since the RFP explicitly provides that aging equipment will be replaced on an ongoing basis, as needed during the contract term. RFP ¶ C.13.3, at C-20. Thus, as any equipment reaches the end of its useful life during the contract term, it is replaced and the value of the equipment may reasonably be considered by the agency to be equal to the cost to supply similarly functional equipment. The agency report states that the government has set aside \$400,000 for the purchase of such equipment under the contract. Contracting Officer’s Statement at 3.

Regarding the nature of the equipment being furnished, EDP’s premise that it involves only kitchen equipment is inaccurate. As the agency report points out, the property to be furnished includes the dining facility itself and its furnishings. While EDP argues that the contractor will not be responsible for major maintenance of the building, since the RFP ¶ C.12, “Responsibility of the Government,” at C-19, provides that the government will repair and maintain the building structure, this clause includes the following exceptions: that the contractor bears the expense of repairs necessary because of its own or its employees’ negligence, and “except as otherwise specified in paragraph C.15.” Paragraph C.15 provides that the contractor must provide everything necessary to “efficiently manage, operate, inspect, maintain and repair the facilities of the FLETC Dining Hall” RFP ¶ C.15, “Buildings, Systems and Dining Hall Equipment: Maintenance, Inspection and Repair,” at C-21. Thus, under the terms of the RFP, the contractor’s responsibility will extend well beyond EDP’s characterization of it as “ensur[ing] that the tables are wiped clean and the artwork dusted.” Protester’s Comments at 2. While EDP attempts to distinguish the situation here from facilities maintenance contracts (for which we have found performance bond requirements to be reasonable), we find the distinction unpersuasive, both because the contractor here will have some responsibility for maintenance of the provided facility, and because we see no significance in the distinction in any case: the building, equipment and furnishings all represent “Government property . . . to be provided to the contractor for use in performing the contract,” listed in FAR § 28.103-2(a) as one of the four examples of situations that may warrant a performance bond.

With respect to the amount of the bond required, we do not think 20 percent of the base year is unreasonable. EDP cites our decision in Bara-King Photographic, Inc., B-226408.2, Aug. 20, 1987, 87-2 CPD ¶ 184, in which we found unreasonable the requirement for a performance bond in the amount of \$1.9 million to protect the government’s interest in a contract under which the government-furnished equipment

was valued at approximately \$102,000. EDP's reliance on that decision is misplaced. First, in Bara-King, the performance bond requirement was based solely on the value of the government-furnished equipment, whereas here the agency is also requiring the performance bond based on its need to ensure uninterrupted performance. Moreover, in Bara-King, the bond amount was to be equal to the contract price for the base period and the first option year, while here the government is requiring a bond equal to only 20 percent of the base year contract price. In our view, this level of performance guarantee—which would cover approximately 10 weeks of performance, allowing the training center time to replace a defaulting or otherwise terminated contractor—is not unreasonable. In this connection, FAR § 28.102-2(a)(1) specifically provides that the penal amount of the performance bond shall be 100 percent of the original contract price unless the contracting officer determines that a lesser amount would be adequate to protect the government. Where there is a necessity for continued performance of services essential to the operation of an installation, we have found nothing inherently unreasonable in an agency's determination to require a 100 percent performance bond. See J & J Maintenance, Inc., B-239035, July 16, 1990, 90-2 CPD ¶ 35 at 3.

The protest is denied.²

Comptroller General
of the United States

² As a supplemental issue, EDP also protested that the agency had replaced certain equipment prior to the issuance of the RFP but had not added it to the schedule of equipment in the RFP, allegedly placing offerors at a disadvantage by the omission. Since the agency responded by taking the corrective action of appropriately amending the solicitation and extending the deadline for submission of proposals, this issue has become academic and is not for consideration on the merits.

